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No. 02-1080

IN THE

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, LPA, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE AMERICAN BENEFITS COUNCIL, AND THE ERISA INDUSTRY COMMITTEE IN SUPPORT OF PETITIONER

DANIEL Y. YAGER
TIMOTHY J. BARTL
LPA, INC.
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8670

Attorneys for Amicus Curiae LPA, Inc.

ANN ELIZABETH REESMAN
KATHERINE Y.K. CHEUNG
Counsel of Record
MCGUINESS NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600

Attorneys for Amicus Curiae Equal Employment Advisory Council

March 21, 2003

Additional Counsel Listed on Inside Cover

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

STEPHEN A. BOKAT
ROBIN S. CONRAD
ELLEN D. BRYANT
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W
Washington, D.C. 20062
(202) 463-5337

Attorneys for Amicus Curiae
The Chamber of Commerce
of the United States

LYNN D. DUDLEY
Vice President and Senior
Counsel
AMERICAN BENEFITS COUNCIL
1212 New York Ave., N.W.
Suite 1250
Washington, D.C. 20005
(202) 289-6700

Attorney for Amicus Curiae
American Benefits Council

CATHERINE CREECH
DAVIS & HARMAN, LLP
1455 Pennsylvania Ave., N.W.
Suite 1200
Washington, D.C. 20004
(202) 347-2230

Attorney for Amicus Curiae
American Benefits Council

JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION OF
MANUFACTURERS
1615 H Street, N.W.
Washington, D.C. 20004
(202) 637-3000

Attorneys for Amicus Curiae
National Association of
Manufacturers

MARK J. UGORETZ
THE ERISA INDUSTRY
COMMITTEE
1400 L Street, N.W.
Suite 350
Washington, D.C. 20005
(202) 789-1400

Attorney for Amicus Curiae
The ERISA Industry Committee

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.1 and .2 of the Rules of this Court, the Equal Employment Advisory Council (EEAC); LPA, Inc. (LPA); The Chamber of Commerce of the United States (the Chamber); the National Association of Manufacturers (NAM); the American Benefits Council (ABC); and The ERISA Industry Committee (ERIC) hereby respectfully move this Court for leave to file the attached brief as *amici curiae* in support of the position of the petitioner in this case. The written consent of the attorney for the petitioner has been filed with the Clerk of the Court. The consent of the attorney for the respondents was requested but refused.

In support of their motion, EEAC, LPA, the Chamber, NAM, ABC, and ERIC submit the following:

1. The decision of the Sixth Circuit in this case creates significant uncertainty in an area of substantial importance to employers. In particular, the decision below jeopardizes employer-sponsored benefit plans. By forcing employers to reevaluate common employer practices that benefit older workforce employees, such as enhanced retiree health programs and pension plans, the decision below could have the perverse effect of reducing the availability of such benefits for all workers. In addition, the decision below also subjects employers to significantly more, and potentially conflicting, discrimination claims over their personnel actions.

2. Their experience in these matters makes EEAC, LPA, the Chamber, NAM, ABC, and ERIC well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

3. The Equal Employment Advisory Council is a nationwide association of over 340 large employers that are firmly committed to promoting sound approaches to the elimination of discriminatory employment practices.

4. LPA, Inc. is a public policy advocacy organization representing corporate executives responsible for human resource policy from more than 200 leading corporations doing business in the United States.

5. The Chamber of Commerce of the United States is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country.

6. The National Association of Manufacturers is the nation's largest multi-industry trade association, representing 14,000 member companies (including 10,000 small and mid-sized manufacturers) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

7. The American Benefits Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees, including sponsoring or providing services to retirement and health plans covering more than 100 million Americans.

8. The ERISA Industry Committee is a non-profit organization representing America's largest private employers that maintain ERISA-covered pension, healthcare, disability, and other employee benefit plans, which often operate in more than one state, and sometimes in all fifty states, providing benefits to millions of active workers, retired persons, and their families nationwide.

9. All of EEAC's, LPA's and ERIC's members, and many of the members of the Chamber, NAM, and ABC are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. §§ 621 *et seq.*, as well as other equal employment statutes and regulations.

10. As employers, and as potential respondents to employment discrimination claims, members of EEAC, LPA, the Chamber, NAM, ABC, and ERIC have a strong interest in the issue presented for the Court's consideration—whether the ADEA provides a cause of action for "reverse" discrimination for someone who claims that an older worker was treated more favorably. By recognizing such a cause of action, the Sixth Circuit's decision puts in doubt many employer practices, in addition to retiree health benefits, that previously had been commonly accepted.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council, LPA, Inc., The Chamber of Commerce of the United States, the National Association of Manufacturers, the American Benefits Council, and The ERISA Industry Committee respectfully request that the Court grant them leave to file the accompanying brief *amici curiae*.

Respectfully submitted,

DANIEL Y. YAGER
TIMOTHY J. BARTL
LPA, INC.
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8670
Attorneys for Amicus Curiae LPA, Inc.

STEPHEN A. BOKAT
ROBIN S. CONRAD
ELLEN D. BRYANT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W
Washington, D.C. 20062
(202) 463-5337
Attorneys for Amicus Curiae The Chamber of Commerce of the United States

ANN ELIZABETH REESMAN
KATHERINE Y.K. CHEUNG
Counsel of Record
MCGUINESS NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1615 H Street, N.W.
Washington, D.C. 20004
(202) 637-3000
Attorneys for Amicus Curiae National Association of Manufacturers

LYNN D. DUDLEY
Vice President and Senior Counsel
AMERICAN BENEFITS COUNCIL
1212 New York Ave., N.W.
Suite 1250
Washington, D.C. 20005
(202) 289-6700
Attorney for Amicus Curiae American Benefits Council

CATHERINE CREECH
DAVIS & HARMAN, LLP
1455 Pennsylvania Ave., N.W.
Suite 1200
Washington, D.C. 20004
(202) 347-2230
Attorney for Amicus Curiae American Benefits Council

MARK J. UGORETZ
THE ERISA INDUSTRY COMMITTEE
1400 L Street, N.W.
Suite 350
Washington, D.C. 20005
(202) 789-1400
Attorney for Amicus Curiae The ERISA Industry Committee

March 21, 2003

QUESTION PRESENTED

Whether the Age Discrimination in Employment Act (ADEA) provides a cause of action for a claim of "reverse discrimination" by an individual age 40 or over who claims that an older worker was treated more favorably.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT OF THE CASE	4
SUMMARY OF REASONS FOR GRANTING THE WRIT	5
REASONS FOR GRANTING THE WRIT	6
I. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THE SEVENTH AND OTHER CIRCUITS THAT HAVE CONCLUDED THAT THE ADEA DOES NOT SUPPORT A CLAIM FOR "REVERSE" DISCRIMINATION, AS WELL AS THIS COURT'S PRONOUNCEMENTS ON THE PROPER INTERPRETATION OF THE ADEA	6
A. The Seventh Circuit Has Held That Reverse Discrimination Claims Are Not Cognizable Under the ADEA	6
1. The plain language of the ADEA precludes reverse discrimination claims	6
2. The ADEA legislative history does not support reverse discrimination claims	8
B. The First and Ninth Circuits Also Cast Considerable Doubt on the Availability of a Claim for Reverse Discrimination Under the ADEA	9

TABLE OF CONTENTS—Continued

Page

C. The Decision Below Is Inconsistent, and Arguably Conflicts, With This Court's Prior Pronouncements on the Proper Interpretation of the ADEA 10

II. THE DECISION BELOW CREATES SIGNIFICANT UNCERTAINTY IN AN AREA OF SUBSTANTIAL IMPORTANCE TO EMPLOYERS 13

A. The Decision Below Jeopardizes Employer-Sponsored Benefit Plans 13

B. The Decision Below Subjects Employers to Significantly More, and Potentially Conflicting, Discrimination Claims Over Personnel Actions 16

CONCLUSION 20

TABLE OF AUTHORITIES

CASES Page

EEOC v. Wyoming, 460 U.S. 226 (1983) 5, 12

Hamilton v. Caterpillar, Inc., 966 F.2d 1226 (7th Cir. 1992) 5, 6, 7, 8

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 5, 11, 12, 19

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 18

O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996) 5, 10, 11

Parker v. Wakelin, 882 F. Supp. 1131 (D. Me. 1995) 10

Public Employees Retirement System v. Betts, 492 U.S. 158 (1989) 8

Schuler v. Polaroid Corp., 848 F.2d 276 (1st Cir. 1988) 5, 9, 10

Sitko v. Goodyear Tire & Rubber Co., No. 02-4083 (6th Cir.) 19

Stokes v. Westinghouse Savannah River Co., 206 F.3d 420 (4th Cir. 2000) 19

Stone v. Travelers Corp., 58 F.3d 434 (9th Cir. 1995) 5, 10

Sutton v. United Airlines, Inc., 527 U.S. 471 (1999) 7

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 18

FEDERAL STATUTES

Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq* ..... *passim*

29 U.S.C. § 623(l)(1)(A) 15

Internal Revenue Code

26 U.S.C. § 401(a)(28)(B)(iii) 16

TABLE OF AUTHORITIES—Continued

	Page
Older Workers Benefit Protection Act of 1990, P.L. 101-433	9
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*	17
FEDERAL REGULATIONS	
26 C.F.R. § 1.401(a)(4)-8(b)	16
29 C.F.R. § 1625.2(a)	8
LEGISLATIVE HISTORY	
133 Cong. Rec. H16,170 (daily ed. Dec. 4, 1967)	8
136 Cong. Rec. H8614 (daily ed. Oct. 2, 1990)	9
H.R. Rep. No. 90-805 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213	8
MISCELLANEOUS	
The Current State of Retiree Health Benefits: Findings from the Kaiser/Hewitt 2002 Retiree Health Survey (Dec. 2002)	14, 15
Employment Policy Found., Tabulation of Census Bureau/Bureau of Labor Statistics Current Population Survey (Nov. 2002)	17
United States Dep't of Labor, *The Older American Worker—Age Discrimination in Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965), *reprinted in* Hearings on H.R. 10634 and Similar Bills Before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 89th Cong., 1st Sess. (1965)	12

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, LPA, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE AMERICAN BENEFITS COUNCIL, AND THE ERISA INDUSTRY COMMITTEE IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council, LPA, Inc., The Chamber of Commerce of the United States, the National Association of Manufacturers, the American Benefits Council, and The ERISA Industry Committee respectfully submit this brief *amici curiae*, contingent upon the granting of the accompanying motion for leave. The brief supports the petition for a writ of certiorari.[1]

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over 340 of the nation's largest private sector corporations, which collectively employ more than 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

LPA, Inc. ("LPA") is a public policy advocacy organization representing corporate executives responsible for human resource policy from more than 200 leading corporations doing business in the United States. LPA's purpose is to provide in-depth information, analysis, and opinion about current situations and emerging trends in labor and employment policy. LPA members are typically companies with business operations in the United States that have more than $750 million in revenues and more than 2,500 employees. The total number of persons employed by LPA member companies in the United States is nearly 13 million Americans, more than 12 percent of the private sector work force. A large share of LPA members currently provide retiree health care for their employees. In light of rapidly increasing health care costs, LPA has a keen interest in ensuring that the ADEA provides sufficient flexibility with respect to health benefits, thus enabling employers to provide some measure of coverage in the future.

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the nation's largest multi-industry trade association. NAM represents 14,000 member companies (including 10,000 small and mid-sized manufacturers) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

The American Benefits Council ("ABC") is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, ABC members either sponsor or provide services to retirement and health plans covering more than 100 million Americans.

The ERISA Industry Committee ("ERIC") is a nonprofit organization representing America's largest private employers that maintain ERISA-covered pension, healthcare, disability, and other employee benefit plans, providing benefits to millions of active workers, retired persons, and their families nationwide. All of ERIC's members do business in more than one state, and many have employees in all fifty states. ERIC frequently participates as *amicus* in cases with the potential for far-reaching effect on employee benefit plan design or administration.

All of EEAC's, LPA's, and ERIC's members, and many of the members of the Chamber, ABC, and NAM are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. §§ 621 *et seq.*, as well as other equal employment statutes and regulations. As employers, and as potential respondents to employment discrimination claims, *amici's* members have a strong interest in the issue presented for the Court's consideration—whether the ADEA provides a cause of action for "reverse" discrimination for someone who claims that an older worker was treated more favorably.

Thus, *amici* have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of their experience in these matters, *amici* are well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Under the collective bargaining agreement negotiated between petitioner General Dynamics Land Systems, Inc. ("General Dynamics") and the United Auto Workers ("UAW") that was in effect prior to July 1, 1997, General Dynamics provided full health insurance benefits to retired workers with 30 years of seniority. Petitioner's Appendix, at 3a. In early 1997, General Dynamics and UAW negotiated a new collective bargaining agreement, which obligated General Dynamics to offer retiree health benefits only to employees who were at least 50 years old as of July 1, 1997, the date the new agreement took effect. *Id.*

The respondents are current and former employees of General Dynamics who were between 40 and 50 years old on July 1, 1997. *Id.* Each of the respondents would have been eligible for retiree health benefits under the collective bargaining agreement in effect before July 1, 1997, but did not qualify for benefits under the new agreement. *Id.* Respondents sued General Dynamics, alleging that limiting the availability of retiree health benefits to employees 50 years old and over constituted age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq*.

The United States District Court for the Northern District of Ohio dismissed respondents' complaint. The district court reasoned that an allegation that older workers received more favorable treatment than younger workers was a claim for "reverse" age discrimination, which was not actionable under the ADEA. Pet. App. 4a. A divided panel of the U.S. Court of Appeals for the Sixth Circuit reversed. In the majority's view, the statute bars employment discrimination against any individual 40 or older on the basis of age, regardless of whether older or younger workers received more favorable treatment.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The decision below is inconsistent with the decisions of the Seventh and other circuits that have concluded that the ADEA does not support a claim for "reverse" discrimination. In *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226 (7th Cir. 1992), the Seventh Circuit held that the plain language of the ADEA and legislative history mandate that reverse discrimination claims are not cognizable under the ADEA. In addition, the First and Ninth Circuits also have cast considerable doubt on the availability of a claim for reverse discrimination under the ADEA. *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988); *Stone v. Travelers Corp.*, 58 F.3d 434 (9th Cir. 1995).

The Sixth Circuit's decision also is inconsistent, and arguably conflicts, with this Court's prior rulings on the proper interpretation of the ADEA. In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), this Court ruled that a plaintiff need show only that he was replaced by someone who was *substantially younger* in order to establish an inference of age discrimination under the ADEA. The focus on the plaintiff's older age relative to his replacement indicates that the action must favor someone *younger* than the plaintiff to be unlawful under the ADEA.

The Sixth Circuit also ignored *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), in which this Court recognized that Congress intended, in passing the ADEA, to protect older workers from harmful stereotypes that their ability to work declines with advancing age. Nor did the appeals court adequately address the considerable legislative history this Court discussed in *EEOC v. Wyoming*, 460 U.S. 226 (1983), showing that Congress did not mean to prohibit employment actions that favor older workers.

In addition, the decision below creates significant uncertainty in an area of substantial importance to employers.

In particular, the decision below jeopardizes employer-sponsored benefit plans. By forcing employers to reevaluate common employer practices that benefit older workforce employees, such as enhanced retiree health programs and pension plans, the decision below could have the perverse effect of reducing the availability of such benefits for all workers. In addition, the decision below also subjects employers to significantly more, and potentially conflicting, discrimination claims over their personnel actions.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THE SEVENTH AND OTHER CIRCUITS THAT HAVE CONCLUDED THAT THE ADEA DOES NOT SUPPORT A CLAIM FOR "REVERSE" DISCRIMINATION, AS WELL AS THIS COURT'S PRONOUNCEMENTS ON THE PROPER INTERPRETATION OF THE ADEA

A. The Seventh Circuit Has Held That Reverse Discrimination Claims Are Not Cognizable Under the ADEA

1. The plain language of the ADEA precludes reverse discrimination claims

The decision below directly conflicts with the decision of the U.S. Court of Appeals for the Seventh Circuit, which ruled in *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226 (7th Cir. 1992), that the ADEA does not support a claim for reverse age discrimination. In that case, Caterpillar offered early retirement benefits to workers who were either 60 years or older with 10 years of service, or 55 years or older, if the sum of their years of service and age totaled 85. Caterpillar later modified this plan to extend early retirement benefits also to workers who were 50 years or older with 10 years of service.

A group of former employees between the ages of 40 and 50 years old who had more than 10 years of service sued Caterpillar for reverse age discrimination because they were *too young* to qualify for the benefits. The district court ruled that the ADEA does not recognize a cause of action for reverse age discrimination. The Seventh Circuit affirmed.

The Seventh Circuit said the plain language of the ADEA indicates that the law does not cover claims brought by younger workers over 40 that older workers were favored. In the congressional statement of findings and purpose at the beginning of the ADEA, Congress specifically referred to the problems faced by "older workers" and "older persons," particularly "relative to the younger ages" as the motivation for the statute. 29 U.S.C. § 621. To the Seventh Circuit, this language clearly indicates Congress's intent to protect workers who were discriminated against *because they were too old*, not because they were too young.

> [T]he phrase "arbitrary age discrimination" refers to Congress's understanding that discriminating against *older people* on the basis of their age is arbitrary . . . Congress was concerned that older people were being cast aside on the basis of inaccurate stereotypes about their abilities. The young . . . cannot argue that they are similarly victimized.

966 F.2d at 1228 (citation omitted).

These statements of legislative findings demonstrate that Congress did not intend to allow *every* worker age 40 and over to claim age discrimination simply because she or he is a member of the ADEA-protected class, the court held. Rather, the statute prohibits employers from arbitrarily favoring younger workers over older ones based on inaccurate and harmful stereotypes that as individuals age, they become less able in the workplace. *Cf. Sutton v. United Airlines, Inc.*, 527 U.S. 471, 484 (1999) (relying on legislative findings enacted

as part of the Americans with Disabilities Act to show congressional intent).[2]

2. The ADEA legislative history does not support reverse discrimination claims

As the Seventh Circuit noted, "[t]here is no evidence in the legislative history that Congress had any concern for the plight of workers arbitrarily denied opportunities and benefits because they are too *young*." 966 F.2d at 1228. Indeed, the legislative history is replete with explanations that the primary purpose of the bill was to promote employment opportunities for *older* workers.[3] The congressional debate accompanying passage of the ADEA reveals the intent to combat inaccurate and harmful stereotypes of an older worker as "an inflexible person, in physical decline, capable of only low productivity, [which] bars the employer from a fair evaluation of the applicant's actual ability and performance record." 133 Cong. Rec. H16,170 (daily ed. Dec. 4, 1967) (statement of Rep. Olsen).

In fact, Congress deliberately chose not to establish an age threshold lower than 40 for membership in the protected class. Congress specifically felt "a further lowering of the age limit proscribed by the bill would lessen the primary objective; that is, the promotion of employment opportunities for older workers." H.R. Rep. No. 90-805, at 6 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2219. By recognizing

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[2] The Seventh Circuit also rejected a regulation promulgated by the Equal Employment Opportunity Commission (EEOC) at 29 C.F.R. § 1625.2(a) interpreting the ADEA as supporting a claim for reverse age discrimination because it conflicted with the statute. 966 F.2d at 1228. As this Court held in *Public Employees Retirement System v. Betts*, 492 U.S. 158, 171 (1989), "no deference is due to agency interpretations at odds with the plain language of the statute itself."

[3] *See, e.g.*, H.R. Rep. No. 90-805, at 4, 6 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2214-17.

reverse discrimination claims under the ADEA, the decision below similarly frustrates the primary goal of the ADEA to protect older workers.

When Congress amended the ADEA by passing the Older Workers Benefit Protection Act of 1990 (OWBPA), P.L. 101-433, it was understood that the ADEA did not require employers to provide the same benefits for younger workers in the ADEA-protected class as older workers. For example, in describing a "wide variety" of early retirement incentives that were lawful under the ADEA even prior to the OWBPA amendments, the Statement of Managers that accompanied the Act noted that the ADEA allows "a plan that gives employees who have attained age 55 and who retire during a specified window period credit for 5 additional years of service and/or age. . . ." 136 Cong. Rec. H8614, H8619 (daily ed. Oct. 2, 1990) (Statement of Managers). The example is premised on the interpretation that the ADEA allows an employer to limit employee benefit enhancements to workers who are age 55 and older. In contrast, the Sixth Circuit's interpretation would require that benefits be uniform for all workers in the ADEA-protected class.

B. The First and Ninth Circuits Also Cast Considerable Doubt on the Availability of a Claim for Reverse Discrimination Under the ADEA

The Sixth Circuit's decision also is incompatible with the First Circuit's ruling in *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988). In that case, the First Circuit rejected an older worker's claim that a company severance plan, which gave greater benefits to workers with more seniority, violated the ADEA by inducing him to resign.

In an opinion written by then-Judge Breyer, the First Circuit held that the ADEA "does not forbid treating older persons *more* generously than others." *Id.* at 278. The court

explained that a company severance incentive package that offered increased benefits to more senior employees who resigned voluntarily was a *favor* to them, and thus could not support an age discrimination claim. "That plan was a carrot, not a stick, and . . . a 'carrot' cannot ordinarily violate the Age Discrimination in Employment Act." *Id.* (citation omitted); *see also Parker v. Wakelin*, 882 F. Supp. 1131, 1140-41 (D. Me. 1995) (dismissing ADEA reverse age discrimination lawsuit by teachers between ages of 40 and 50, who were too young to vest in retirement benefits).

In addition, the Ninth Circuit expressed considerable doubt that the ADEA supports a claim for reverse age discrimination in *Stone v. Travelers Corp.*, 58 F.3d 434 (9th Cir. 1995). In that case, a company severance plan permitted only employees over the age of 55 to receive their benefits as a lifetime annuity. The plaintiff, who was 52 years old, claimed discrimination because he was too young to receive an annuity. Although the Ninth Circuit did not rule on the viability of the plaintiff's reverse age discrimination claim, it described the nature of his claim with disbelief: "Stone claims that Travelers violated the ADEA by discriminating against him because he was too young!" *Id.* at 437.

C. The Decision Below Is Inconsistent, and Arguably Conflicts, With This Court's Prior Pronouncements on the Proper Interpretation of the ADEA

This Court ruled in its unanimous opinion in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), that the appropriate test for illegal age discrimination under the ADEA is the replacement of the plaintiff by someone who is *substantially younger*, but who need not be outside the protected class, *i.e.*, under 40 years of age. "Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially

younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class." *Id.* at 313.

The Court observed that a test which merely looked at whether or not the comparator is in the protected class would permit a 40-year-old plaintiff who is replaced by a 39-year-old to claim age discrimination simply because the plaintiff is one year older. In practice, the Court said, this type of case was rare, "since the vast majority of age-discrimination claims come from *older employees*." *Id.* at 312 (emphasis added). Nevertheless, the Court rejected this standard as a reliable indicator of age bias.

Requiring a comparison to a substantially younger worker to establish a prima facie case of age discrimination thus shows that the term "older employee" means *older than the comparator*. The Court's distinction between 40-year-olds, who are part of the ADEA's protected class, and "older employees" also shows that the word "older" is a comparative term. "Older" refers to one's age when compared to someone else's, not just to one's chronological age. The Court's focus in *O'Connor* on the plaintiff's older age relative to his replacement thus shows that discrimination must be in favor of someone *younger* than the plaintiff to be unlawful under the ADEA, an essential point absent in the decision below.

Moreover, this Court explicitly recognized in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), that Congress intended the ADEA to protect older workers from inaccurate and damaging stereotypes about their ability to work. In *Hazen Paper*, the Court described "the very essence of age discrimination [is] for an older employee to be fired because the employer believes that productivity and competence decline with old age . . . Congress' [sic] promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and

stigmatizing stereotypes." 507 U.S. at 610 (citation omitted). The decision below, however, conflicts with this Court's interpretation of the legislative intent underlying the ADEA.

Moreover, the extensive legislative history on which this Court relied in *EEOC v. Wyoming*, 460 U.S. 226 (1983), to hold that the ADEA covered state and local governments, also supports the proposition that the ADEA was designed to protect "older" workers vis-à-vis younger ones. The Court specifically cited with approval the findings of a 1965 report by then-Labor Secretary W. Willard Wirtz on older American workers that showed age discrimination "was based in large part on stereotypes unsupported by objective fact, and was often defended on grounds different from its actual causes. . . ." *Id.* at 231.[4]

The Secretary's Report detailed the problems facing older workers in the U.S., where over half of all employers used an age ceiling from 45 to 55 when hiring new employees, regardless of the applicant's qualifications, and workers over 55 years of age were automatically excluded from over one half of all job openings in private companies. Secretary's Report, at 6. The Secretary also noted that workers age 45 and over were unemployed for eight weeks longer than workers under age 45. *Id.* at 18. The Secretary's conclusion that workers were having more difficulty obtaining new jobs as they grew older thus was a compelling reason for enacting the ADEA.

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[4] United States Dep't of Labor, *The Older American Worker—Age Discrimination in Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965), *reprinted in* Hearings on H.R. 10634 and Similar Bills Before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 89th Cong., 1st Sess. 201-219 (1965) (hereinafter cited as "Secretary's Report").

The decision below thus conflicts with the decisions of the Seventh and other circuits, as well as this Court's prior pronouncements on the proper scope of the ADEA, and thereby warrants this Court's review.

II. THE DECISION BELOW CREATES SIGNIFICANT UNCERTAINTY IN AN AREA OF SUBSTANTIAL IMPORTANCE TO EMPLOYERS

A. The Decision Below Jeopardizes Employer-Sponsored Benefit Plans

The Sixth Circuit's ruling is fundamentally inconsistent with the operation of employee benefit plans offered by *amici's* member companies. *Amici's* member companies conduct business in multiple states across the nation, and they seek to establish uniform policies and employee benefit plans that are consistent with the federal employment nondiscrimination laws. This effort is undermined if there is inconsistency and instability in the federal employment laws that apply to employees located at different geographic locations. Simply put, employers cannot develop uniform and rational retirement and welfare programs for their workers across the country if they face claims for reverse age discrimination by employees who work at sites located in the Sixth Circuit.

The most profound effect of the Sixth Circuit's ruling would arise under employer welfare arrangements, including retiree health programs. The ruling calls into question common employer practices that benefit the oldest workforce employees. For example, employers may provide enhanced welfare benefits (such as severance pay or medical coverage) to older employees in the ADEA-protected class when there is a reduction in the workforce or a fundamental change in the employer's benefit program. An employer that has a reduction in force might provide a higher level of subsidy or enhancement in medical coverage to older departing employees,

e.g., age 50 or older, in an effort to help bridge these workers until they become eligible to receive pension benefits or Medicare coverage. Like General Dynamics, employers forced to reduce future retiree health benefits may elect to keep the same level of retiree health benefits or provide a better transition benefit for older employees while applying the new terms to all other workers. The employer's decision to provide greater benefits to those workers who are at or closer to retirement age recognizes that, as a practical matter, older workers may be impacted more significantly by benefit changes. They may have fewer years left in the workforce to make up for the reduction in future benefits. Workers on the cusp of pension eligibility may have begun to plan their retirement in anticipation of receiving retiree medical coverage. While such voluntary enhancements or transition benefits are highly beneficial to older workers, they would not appear to be lawful under the Sixth Circuit ruling.

If the Sixth Circuit's ruling stands, it could have the perverse effect of further reducing the availability of retiree health benefits for all workers. A 2002 nationwide survey of 435 large employers revealed that the cost of providing retiree health benefits increased an estimated 16% last year, from $12.5 billion in 2001 to an estimated $14.5 billion in 2002. *The Current State of Retiree Health Benefits: Findings from the Kaiser/Hewitt 2002 Retiree Health Survey* (Dec. 2002) (hereinafter referred to as the "Kaiser/Hewitt Survey").[5] Together, these employers offer health benefits to approximately 18.5 million workers and family members and 5.4 million retirees and family members. *Id.* at 58. For them, the increase in the cost of providing retiree health benefits outpaced that of providing health benefits to active workers. *Id.* at 10. Rising costs already have caused some employers with fixed budgets to modify their retiree health coverage.

[5] The survey is available at *http://www.kff.org/content/2002/20021205a/6061v4.pdf.*

Over the past few years, many large employers already have raised retiree contributions to premiums and the amounts of the insureds' deductibles and co-payments. *Id.* at 37-38.

The increased likelihood that employers will face lawsuits under the ADEA over *any* differential in their benefit plans, including those that actually favor their oldest workers, will exacerbate the pressure to control cost by eliminating these programs altogether. Even if the employer ultimately prevails, mounting a defense to an ADEA lawsuit can be prohibitively expensive.

To minimize this risk, prudent employers simply may choose not to offer benefits that are likely to be challenged, such as retiree health insurance. In fact, 13 percent of the large employers surveyed already have terminated health benefits for *future* retirees (often new or recent hires) in the past two years, and 22 percent predicted that they were likely to do the same in the next three years. *Kaiser/Hewitt Survey*, at 37, 43. Exposing employers that provide retiree health benefits to greater risk of litigation may drive more employers to scale back further their coverage or abandon it altogether.

While the Sixth Circuit's ruling affects retiree health and employer welfare plans most dramatically, *amici*'s member companies also have concerns about the operation of their employee benefit pension plans if reverse age discrimination is a cognizable claim under the ADEA. Under current law, section 623(l)(1)(A) of the ADEA allows employee benefit pension plans to condition the payment of normal or early retirement benefits on the attainment of a certain age. 29 U.S.C. § 623 (l)(1)(A). Presumably, this specific exception for pension plans would not be affected by the Sixth Circuit's ruling.

Retirement plans may include other provisions contingent upon age, however, that may not be covered by the exception in § 623(l). For example, in defined contribution plans, such

as a "401(k)" or similar arrangements, some plans may limit the ability to take in-service withdrawals before retirement to participants who have attained age 50 or above. Another example is the Internal Revenue Code provision requiring certain tax-qualified plans holding employer securities to allow participants who have attained age 55 and have 10 years of participation to diversify the assets in which their accounts are invested. 26 U.S.C. § 401(a)(28)(B)(iii). There may be uncertainty as to whether a plan that incorporates the Internal Revenue Code § 401(a)(28) rule violates the ADEA by not providing similar diversification rights to younger workers in the ADEA-protected class.

In addition, the Sixth Circuit's ruling also casts doubt on another common practice that is recognized by Treasury Department regulations. Many defined contribution plans (including target benefit plans) are "age-weighted" so that larger contributions are made for older participants than for similarly-situated younger employees. *See, e.g.*, 26 C.F.R. § 1.401(a)(4)-8(b). Whether plans that contain this feature unlawfully discriminate against younger workers in the ADEA-protected class is also unclear under the Sixth Circuit's decision.

If, as the Sixth Circuit's rulings suggests, the benefits, rights and features in employee benefit plans must be uniform for all employees age 40 and over, numerous plan designs that have long been assumed to be lawful under the ADEA now would need to be reconsidered. The end result may be a diminution of the benefits that are provided to the oldest employees in the workforce, a perverse outcome under a statute that was intended to protect older employees.

B. The Decision Below Subjects Employers to Significantly More, and Potentially Conflicting, Discrimination Claims Over Personnel Actions

The Sixth Circuit's decision will increase significantly the pool of potential claimants alleging age discrimination, and

thus the number of claims to which employers must respond. Unlike the immutable characteristics covered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, age is a progressive condition that affects everyone. Most workers eventually will attain the age of 40, joining the growing class of individuals protected under the ADEA. On average, 11,684 people (5816 men and 5868 women) in the United States will turn 40 every day in 2003.[6] By expanding the ADEA to include reverse age discrimination claims, the Sixth Circuit allows every one of these workers to look at their older co-workers in addition to younger ones as potential comparators, vastly increasing the number of potential claims they can make.

Collectively, *amici's* member companies routinely make and implement millions of employment decisions each year, including hires, promotions, transfers, disciplinary actions, terminations, and other employment actions. They devote extensive resources to training, awareness, and compliance programs designed to ensure that all of their employment actions comply with Title VII, the ADEA, and other applicable legal requirements.

Nevertheless, each employment transaction is a potential subject of a discrimination charge and/or lawsuit. This prospect is true because each time an employer makes a decision to hire an applicant or promote an employee, for example, there is likely to be at least one candidate who was not selected for the job. If the candidate is substantially older than the individual selected, the candidate probably can establish a prima facie case of age discrimination. The decision below allows candidates who are substantially *younger* than the person selected also to establish a prima facie case of age discrimination in the Sixth Circuit as well.

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[6] Employment Policy Found., Tabulation of Census Bureau/Bureau of Labor Statistics Current Population Survey (Nov. 2002) (microdata records public use file at *http://www.bls.census.gov/cps/cpsmain.htm*).

Almost every applicant or employee can identify a comparator who is *either* older or younger, and who allegedly was treated differently. That means virtually every plaintiff will be able to establish a prima facie case of discrimination, thereby shifting the burden to the employer to articulate a legitimate, nondiscriminatory reason for the employment action that the plaintiff may attempt to show is a pretext. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

The decision below could lead to absurd results. For example, an employer that hires a 50 year old from a pool of applicants of various ages may receive multiple claims of age discrimination, all challenging a single employment action. Some plaintiffs may allege they were not hired because they were too old while others claim they were rejected because they were too young. As long as a substantial age difference existed between the person selected and the plaintiff, both older and younger plaintiffs probably would establish a prima facie case of age discrimination under the Sixth Circuit's standard. Thus, an employer could be sued for discriminating against both older and younger applicants at the same time.

Although the prima facie test is not an onerous one, it does weed out clearly unmeritorious claims. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). However, under the Sixth Circuit's ruling, the only time the prima facie case would not exist is if the comparator were approximately the same age as the plaintiff, which is highly unlikely. Therefore, employers operating in the Sixth Circuit will be forced to defend themselves against significantly more age discrimination complaints than businesses located in other jurisdictions. While these employers ultimately may be able to articulate legitimate, nondiscriminatory reasons for their employment actions, they still must undergo a lengthy and expensive process to refute each charge of discrimination.

Moreover, as a practical matter, the Sixth Circuit's decision effectively eliminates an important defense for employers to an age discrimination suit. One way an employer may defend against a claim under the ADEA that it discriminated against an older worker because of his age is to show that it actually treated the older worker *better* than a younger one. In *Stokes v. Westinghouse Savannah River Co.*, 206 F.3d 420 (4th Cir. 2000), for example, the Fourth Circuit held the employer did not violate the ADEA by requiring the 56 year old plaintiff to choose between receiving a lump-sum severance payment or a special retirement option as part of a lay off. As the court pointed out, the plaintiff was treated *better* than his younger co-workers, who received only the severance benefit. *Id.* at 426.

While this defense may defeat the older worker's age discrimination claim, it also would *prove* a reverse discrimination claim by a younger employee who is within the ADEA-protected class under the Sixth Circuit's decision. The potential liability for reverse age discrimination created by this defense may lead employers to forsake the defense completely.[7] Review of the Sixth Circuit's decision by this

[7] The Sixth Circuit's recognition of a cause of action for reverse age discrimination poses problems not only for employers defending against disparate treatment cases, but also where a plaintiff alleges a disparate impact based on age. This Court has never recognized that a disparate impact cause of action exists under the ADEA. *Hazen Paper*, 507 U.S. at 610. Likewise, the Sixth Circuit has not ruled on the viability of a disparate impact claim under the ADEA. That court, however, is currently considering on appeal a case that raises this issue. *Sitko v. Goodyear Tire & Rubber Co.*, No. 02-4083 (6th Cir.).

If the Sixth Circuit were to rule that disparate impact claims are cognizable under the ADEA, allowing "reverse" age discrimination would only complicate matters. To monitor fully every conceivable age disparity, an employer would have to make a statistical comparison of the impact of each selection criterion on employees of every age to employees of every other age, both older and younger. This analysis would be overly burdensome on employers, and ultimately meaningless. Since the age of

Court is thus necessary to address the increased number of, and potentially conflicting, discrimination claims employers undoubtedly will face.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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the employee population is constantly changing, developing an accurate picture of the effect of a particular employment practice on employees of different ages will be impossible.

Respectfully submitted,

DANIEL Y. YAGER
TIMOTHY J. BARTL
LPA, INC.
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8670

Attorneys for Amicus Curiae LPA, Inc.

STEPHEN A. BOKAT
ROBIN S. CONRAD
ELLEN D. BRYANT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W
Washington, D.C. 20062
(202) 463-5337

Attorneys for Amicus Curiae The Chamber of Commerce of the United States

LYNN D. DUDLEY
Vice President and Senior Counsel
AMERICAN BENEFITS COUNCIL
1212 New York Ave., N.W.
Suite 1250
Washington, D.C. 20005
(202) 289-6700

Attorney for Amicus Curiae American Benefits Council

CATHERINE CREECH
DAVIS & HARMAN, LLP
1455 Pennsylvania Ave., N.W.
Suite 1200
Washington, D.C. 20004
(202) 347-2230

Attorney for Amicus Curiae American Benefits Council

ANN ELIZABETH REESMAN
KATHERINE Y.K. CHEUNG
Counsel of Record
MCGUINESS NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600

Attorneys for Amicus Curiae Equal Employment Advisory Council

JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1615 H Street, N.W.
Washington, D.C. 20004
(202) 637-3000

Attorneys for Amicus Curiae National Association of Manufacturers

MARK J. UGORETZ
THE ERISA INDUSTRY COMMITTEE
1400 L Street, N.W.
Suite 350
Washington, D.C. 20005
(202) 789-1400

Attorney for Amicus Curiae The ERISA Industry Committee

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